Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

EDWARD R. BRUMLEY,
Counsel for Respondent,
Room 3841, Grand Central Terminal,
New York 17, N. Y.

ROBERT M. PEET,
JAMES D. O'NEILL,
Of Counsel.

INDEX.

Table of Cases Cited:

OTHER AUTHORITIES CITED:

Supreme Court of the United States.

No. 203—October Term, 1952.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE CITY OF NEW YORK,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF.

Opinions of the Courts Below.

The opinion of Judge Hincks of the United States District Court for the District of Connecticut (R. 80-92) is reported in 105 F. Supp. 413.

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit affirming the order appealed from on the opinion of the District Court (R. 94), together with the dissenting opinion of Judge Frank (R. 94-106), is reported in 197 F. 2d 428.

Jurisdiction.

The judgment of the Court of Appeals was rendered and filed on June 5, 1952 (R. 106-107). Petition for writ of certiorari was filed on July 16, 1952. Certiorari was granted on October 13, 1952 (R. 108).

Jurisdiction of this Court under 28 U. S. C., § 1254 (1) is alleged.

Questions Presented.

The principal questions presented are as follows:

(1) Was the City a "creditor" holding "claims" within the meaning of subsection 77 (b) of the Bankruptcy Act with respect to its unpaid pre-bankruptcy assessments for local improvements secured by liens on the specific parcels of real property of the Railroad that were assessed?

(2) If so, were the City's "claims" forever barred by its failure to file them or to intervene in the Railroad's reorganization proceedings prior to the final decree, where the City had actual knowledge of the proceedings and notice by publication of a general bar order in the proceedings requiring the filing of all claims of creditors?

(3) Were the City's "claims" preserved by the terms of the Plan of Reorganization and the Final Decree in the reorganization proceedings?

Statutes Involved.

The sections of the Bankruptcy Acts referred to herein are set forth in an appendix.

Statement of the Case.

From 1894 to 1930 the City laid upon certain real property belonging to the Railroad in Bronx County a number of assessments for local improvements (R. 3, 6-16). The Railroad has refused to pay these assessments ever since they were laid, on the ground that they were void as a matter of law (R. 2, 18). The Railroad did not seek review of these assessments by means of the procedures provided for that purpose, because under New York law an assessment which is void as a matter of law remains void whether or not such review is obtained (R. 18). Under the law of New York, each assessment, insofar as valid and not void, became a lien in favor of the City against the specific real property upon which it was laid, until paid in full (R. 2). Whether there was any personal liability on the part of the Railroad depends on the applicability of Section 71 of the Tax Law of New York.

On October 23, 1935 proceedings for the reorganization of the Railroad under Section 77 of the Bankruptcy Act were commenced in the United States District Court for the District of Connecticut (R. 2). Nearly twelve years later, on September 18, 1947, a Consummation Order and Final Decree concluding these reorganization proceedings became effective (R. 2).

Under the terms of Order No. 32 in these proceedings, issued on January 4, 1936 pursuant to Section 77 (c) (7) of the Bankruptcy Act, claims of creditors were required to be filed or evidenced by May 1, 1936, and after that date no claim not so filed or evidenced might participate except on order for cause shown (R. 40). Under this order, creditors were directed to set forth in their claim the nature of any security for the claim and the facts with respect to any lien, priority or preferential classification claimed (R. 40). The terms of this order were pub-

lished, among other places, in the Wall Street Journal in New York City once a week for two consecutive weeks (R. 20, 41).

The City had actual notice of the Railroad's reorganization proceedings by June of 1936 or earlier, but never at any time has it filed or evidenced a claim for its unpaid assessments and the liens therefor or sought to intervene in the reorganization proceedings or petitioned for leave to file a claim (R. 20).

The assessed property has at all times been in the exclusive possession and control of the Railroad or its reorganization trustees (R. 2).

Nowhere in the Plan of Reorganization, the Order Confirming the Plan, the Consummation Order and Final Decree, or the trustees' deed pursuant thereto is there any specific reference to the City's unpaid assessments (R. 18, 54-61, 66-76).

Section L of the Plan of Reorganization, the only section which could possibly apply to the City's claim, provided that claims against the debtor entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees during the reorganization proceedings, to the extent unpaid at the date of confirmation of the Plan, were to be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of the debtor (R. 71).

The Order Confirming the Plan made it binding upon all creditors, secured or unsecured, whether or not they were adversely affected by the Plan, whether or not they filed claims, and whether or not they accepted the Plan (R. 60). It further declared that the property dealt with by the Plan, when transferred and conveyed to the reorganized

company pursuant to the Plan, was to be free and clear of all claims of creditors and of all liens and encumbrances, except such as might be reserved in the Plan, in this order or in the order of transfer and conveyance (R. 60).

The Consummation Order and Final Decree stated that upon the consummation date all the business, affairs, and entire property and estate of the debtor and its trustees were to vest in and become the absolute property of the reorganized company free and clear of all claims, rights, demands, interest, liens and encumbrances of creditors of the debtor or its properties, except for those specifically referred to therein (R. 66). The Consummation Order released and discharged the debtor forever from all of its obligations, debts and liabilities, whether or not presented or allowed in the reorganization proceedings, and from all claims enforcible against its property, except those claims to be paid or assumed in accordance with the Plan of Reorganization (R. 66). The Consummation Order provided that all mortgages, bonds, notes, securities, obligations, debts and liabilities without limitation as to their nature, whether enforcible against the debtor or its property, were to become void and unenforcible against the reorganized company or its property, unless specifically provided for therein (R. 66). Finally, the Consummation Order contained a broad protective injunction to insure its enforcement that included a perpetual restraint against enforcing liens against the reorganized company's real property (R. 68-69).

The deed from the trustees of the debtor to the reorganized company transferred the real property held by the former free and clear of all claims, rights, demands, interests, liens and encumbrances of creditors except those imposed by the Consummation Order (R. 18).

Since September 18, 1947, when the Consummation Order went into effect, the Railroad has repeatedly at-

tempted to sell, and to collect awards for the taking of, its real property in the Bronx free and clear of the City's pre-bankruptcy assessments and liens, but the City has refused to cancel any such assessments and liens of record without receiving payment in full, though requested to do so (R. 2-3).

In paragraph 2 of Section XI of the Consummation Order the bankruptcy court reserved jurdisiction in sub-paragraph (d) to consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the Consummation Order and to construe the Plan of Reorganization as to matters which may require construction, not dealt with in the Consummation Order, and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the Plan of Reorganization, the Consummation Order, and all other orders relative thereto previously issued (R. 69, 71).

The Railroad brought the present petition before the bankruptcy court to obtain instruction whether or not the Plan of Reorganization and the Consummation Order require the payment or assumption of any of the City's pre-bankruptcy assessments outstanding against the Railroad's real property in the Bronx, or make any reservations in favor of such assessments (R. 4). In the event that the Court found that no such requirements or reservations existed, the Railroad asked the Court to declare its real property subject to such assessments free and clear of all liens therefor, to restrain the City from enforcing or attempting to enforce these liens, and to direct the City to cancel of record all such assessments (R. 4).

The Court granted the petition of the Railroad in all respects, finding no requirement or reservation favorable to the City in the Plan of Reorganization or the Consummation Order and granting the full declaratory, injunctive and mandatory relief requested (R. 76-77).

The Court of Appeals affirmed the District Court's order. (R. 94).

Summary of Argument.

The reorganization court had jurisdiction to entertain the petition of the Railroad by reason of the express reservations in the Consummation Order and Final Decree and generally recognized ancillary jurisdiction.

The City of New York was a creditor and its assessment liens were claims under subsection (b) of § 77 of the Bankruptcy Act.

The judge gave reasonable notice of the period in which claims might be filed in accordance with subsection (c) (8) of § 77 and the City has failed to file any notice of claim, although it had timely notice of the reorganization proceedings. Furthermore, as the security was within the jurisdiction of the bankruptcy court, regardless of actual notice of the bar order, the City, with knowledge of the reorganization proceedings, was under the affirmative duty to file a secured claim if it wished to retain its secured status.

An examination of the proceedings, the Plan, and the Consummation Order and Final Decree shows they were intended to bar the liens and be binding upon the City as provided in subsection (f) of § 77.

POINT I.

The District Court had jurisdiction of Respondent's petition.

No doubt as to the jurisdiction of the District Court to entertain the Railroad's petition was expressed by the City in that Court or before the Court of Appeals or in this Court. The District Court declared that it had such jurisdiction (R. 83). The Court of Appeals accepted the opinion of the District Court (R. 94). The dissenting opinion of Judge Frank in the Court of Appeals, while it did not conclude that jurisdiction was lacking, referred to the decisions in several earlier Second Circuit cases involving straight bankruptcy proceedings rather than reorganizations as casting doubt on the question (R. 106).

Paragraph 2 of Section XI of the District Court's Consummation Order and Final Decree reserves to it jurisdiction in sub-paragraph (d) to consider and act in the matter of any application for instructions with respect to the distribution of funds or securities in connection with the Consummation Order and to construe the Plan of Reorganization as to matters which may require construction, not dealt with in the Consummation Order (R. 69), and in sub-paragraph (q) to take such further action as may be necessary to put into effect and carry out the Consummation Order and the Plan of Reorganization and all other orders relative thereto (R. 71).

Section L of the Plan of Reorganization provides in part (R. 71):

> "Claims against the principal debtor and secondary debtors, other than Old Colony, entitled to priority over their respective mortgages, and current liabilities and obligations incurred by the bankruptcy trustees

during the reorganization proceedings, to the extent unpaid at the date of confirmation of the plan, shall be paid in cash or assumed by the reorganized company with the same relative priority as they now have with respect to other obligations of such debtors."

No provisions in the Plan of Reorganization or the Consummation Order and Final Decree refer specifically to the outstanding assessments for local improvements of the City. The part of Section L of the Plan quoted above is the only general provision which might apply to them. When, after the date of the Consummation Order and Final Decree, the City insisted on the enforcibility of its assessments despite its failure to file claim therefor in the reorganization proceedings, the Railroad brought the present petition before the District Court to secure instructions whether or not the Plan of Reorganization (particularly Section L) and the Consummation Order and Final Decree require the payment or assumption of any or all of the assessments of the City or make any reservations in their favor (R. 2, 3, 4). At the same time, the Railroad sought to enjoin the City from violating the terms of the injunction set forth in paragraph 1 of Section XI of the Consummation Order and Final Decree, by which all persons were perpetually restrained from disturbing, interfering with, enforcing liens upon and bringing suit against the property of the reorganized Railroad by reason of any previous claim against the property not imposed by the Plan of Reorganization and the Consummation Order and Final Decree (R. 4, 68).

The District Court's reservation to construe the Plan of Reorganization and injunction to secure execution of the Plan, found in its Consummation Order and Final Decree, are commonly found in such orders and reasonably necessary to achieve and secure the ultimate fruits of the reorganization. Such provisions do not seek to

continue control over the reorganized debtor, to share in the operation of its business or to alter rights vested under the Plan of Reorganization. They merely reserve to the Court which has already dealt with the complexities of the Plan the right to interpret and protect its own decrees in aid of the Plan.

The right of the Court in charge of the reorganization to retain jurisdiction to protect its own decrees, to prevent interference with the execution of the Plan and to aid otherwise in carrying it out is well recognized.

In re The New York, New Haven and Hartford R. Co., 169 F. 2d 337 (C. C. A. 2, 1948), cert. den. 335 U. S. 867;
In re Pittsburgh Terminal Coal Corp., 183 F. 2d 520 (3d Cir., 1950);
In re Hermitage Building Corp., 100 F. 2d 597 (C. C. A. 7, 1938).

The same right has been recognized in courts of equity handling railroad foreclosures.

Julian v. *Central Trust Co.*, 193 U. S. 93.

The court may exercise such jurisdiction even where it has not expressly reserved it.

In re United Bancroft Hotel Co., 86 F. Supp. 690 (D. C. Mass., 1949);
Shores v. *Hendy Realization Co.*, 133 F. 2d 738 (C. C. A. 9, 1943).

In the last-named case, the court said (at p. 741):

"The question was one of interpretation. It involved the administration of the plan itself. The court best equipped as well as the one properly en-

titled to resolve disputes of that kind was the court in which the proceeding had been conducted. As to fundamental questions of interpretation and administration such as these we think the jurisdiction of the bankruptcy court continues whether future consideration of them was expressly reserved or not. Otherwise, interpretations at war with each other no less than with the decree itself may well result."

Although the need for exercising such ancillary jurisdiction is not so great in ordinary bankruptcies, which do not involve the lengthy proceedings and elaborate plans and decrees found in reorganizations, there too the jurisdiction has been upheld. *Local Loan Co.* v. *Hunt*, 292 U. S. 234.

In equity, federal courts have long exercised jurisdiction ancillary to original decrees. The scope of this jurisdiction was defined in *Lewis* v. *United Air Lines Transport Corp.*, 29 F. Supp. 112, 115 (D. C. Conn., 1939) as: "(1) to aid, enjoin or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit." The scope of the jurisdiction of courts handling reorganizations should be equally as broad, since they "are essentially courts of equity, and their proceedings inherently proceedings in equity . . . Their adjudication and orders constitute in all essential particulars decrees in equity." *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675.

POINT II.

The reorganization court had jurisdiction over the pre-bankruptcy assessment liens of the City, and the bar order was binding upon the City.

Property in possession of a receiver is not subject to seizure to enforce collection of a state tax. *In re Tyler*, 149 U. S. 164. A bankruptcy court may restrain the foreclosure of a mortgage on the debtor's property which was begun in another court after the bankruptcy petition was filed. *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734.

The case of *Van Huffel* v. *Harkelrode*, 284 U. S. 225, held that the bankruptcy court had power to deal with the liens of a state. Van Huffel, the plaintiff, bought real property at a bankruptcy sale, free of all liens and encumbrances. Defendant later asserted a lien for unpaid pre-bankruptcy state taxes. Van Huffel sued to quiet his title. The bankruptcy court had the power to sell the property free of the liens for state taxes, and objections as to failure to receive proper notice of the sale and as to the use of a summary instead of a plenary proceeding to determine the priority of liens could not be urged for the first time in this Court.

New York v. *Irving Trust Co.*, 288 U. S. 329, held that a bar order was appropriate against state franchise taxes, otherwise "a fundamental purpose of the Bankruptcy Act would be frustrated" (p. 333). These taxes were liens upon real and personal property. *Carey* v. *Keith*, 250 N. Y. 216 (1929).

The purpose of § 77 is the reorganization of financially embarrassed railroads and to that end the reorganization court has the authority to enjoin the sale of collateral

notes secured by mortgage bonds. *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co., supra,* 294 U. S. 648, 675-676. Subsection 77 (a) grants to the court "exclusive jurisdiction of the debtor and its property, wherever located, * * *." By subsection (j) the judge is authorized to "enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate * * *." Under subsection 77 (o) the judge may order the sale of property subject to or free from liens. Subsection 77 (f) gives the judge the power to restrain prosecution in a state court of suit for the collection of taxes. *Board of Directors of St. Francis Levee District* v. *Kurn,* 91 F. 2d 148 (C. C. A. 8, 1937), cert. den. 302 U. S. 750. Although state law made the taxes a lien against the property assessed an order to the Levee District to present its claims for taxes to the bankruptcy court was affirmed.

Ex parte Baldwin, 291 U. S. 610, arose in a § 77 proceeding. Plaintiff sued in a state court to forfeit the right of defendant trustees to land in their possession held subject to a defeasance clause in the event of failure to operate trains thereover. The bankruptcy court could not only protect from interference property in its possession but could determine all questions respecting it, including "the adjudication of questions respecting the title" (p. 616).

This Court held, in *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, a § 77 proceeding, that a bankruptcy court had jurisdiction to settle a bankrupt's title to land.

The reorganization court has "broad powers over all types of liens," given by subsection 77 (b). *Gardner* v. *State of New Jersey,* 329 U. S. 565, 576. The State of New Jersey filed a proof of claim, claiming a lien upon all the lands, tangible properties and franchises of the debtor in New Jersey. The trustees filed a petition for adjudication

concerning the claims. The Attorney General of New Jersey objected to the jurisdiction of the District Court to entertain the petition, despite the prior filing of the State's proof of claim. This Court held that the claim was filed pursuant to authority and to hold otherwise might imperil it as the time for filing had expired. This Court held that the reorganization court had jurisdiction over the proof and allowance of the tax claims. The State contended that the bankruptcy court had no jurisdiction to adjudicate its secured claim.

The opinion in this Court says (pp. 572-574):

> "*First.* We think, contrary to the position of New Jersey, that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was not a suit against the State. Section 77 deals not only with claims of private parties but with those of public agencies as well. Section 77 (b) defines 'creditors' as 'all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act.' And 'claims' are defined to include 'debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character.'
>
> "*Id.* And § 77 (c) (7) provides for the prompt fixing of a reasonable time within which the 'claims of creditors' may be filed and the manner in which they may be filed and allowed. The words 'all holders of claims' have no qualification and are sufficiently broad to include public agencies as well as private parties. The 'claims' of creditors include secured and unsecured claims. We find not the slightest suggestion that Congress left out the large class of tax claims which recurringly appears in reorganizations and often assumes, as here, large proportions. They are expressly included among provable claims in § 57n of

the Bankruptcy Act, 52 Stat. 840, 867, 11 U. S. C. § 93 (n). And the sweeping, all-inclusive definitions of 'claims' and 'creditors' in § 77 leave room for no exception under it."

The opinion refers to *New York* v. *Irving Trust Co.*, *supra*, 288 U. S. 329, in which a State's tax claim was barred because not filed within time. It then continues (p. 575):

"To hold otherwise might, indeed, imperil the claim which New Jersey so vigorously asserts. For it appears that the time for filing claims has expired and under the rule of *New York* v. *Irving Trust Co.*, *supra*, a filing at this late date might come too late."

The *Gardner* decision holds (p. 576) that the reorganization court has broad powers over all types of liens under subsection (b) of § 77. Subsection (b) (1) provides that a plan shall include provisions as to rights of secured creditors. Subsection (b) (5) directs that a plan may include the sale of property subject to or free from any lien, the satisfaction or modification of any liens.

The opinion says (pp. 576-577):

"While valid liens existing at the commencement of bankruptcy proceedings have always been preserved, it has long been a function of the bankruptcy court to ascertain their validity and extent and to determine the method of their liquidation. *Whitney* v. *Wenman*, 198 U. S. 539, 552; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737-738; *Straton* v. *New*, 283 U. S. 318, 321. Moreover, both in receivership cases, *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480, and in bankruptcy cases, *Van Huffel* v. *Harkelrode*, 284 U. S. 225; *New York* v. *Irving Trust Co.*, *supra*, the authority of the court to deal with the lien of a State has long been recognized. In reorganization cases the task of re-

solving disputes as to liens is a common one for the court. See *Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 569. Indeed, before a plan of reorganization can be designed in accord with fair and equitable requirements, liens must be disentangled and their relative priorities ascertained. This problem, present in most reorganizations, is acute in the railroad field."

Taxes which, under state law, constitute a lien against the property assessed are claims under §77.[1] *Board of Directors of St. Francis Levee District* v. *Kurn*, 98 F. 2d 394 (C. C. A. 8, 1938), cert. den. 305 U. S. 647. The necessity for dealing with liens in a corporate reorganization is obvious, especially in a railroad reorganization where so much of the property is covered by secured claims. Not to consider a lien would hinder reorganization and the purpose of §77. *Lyford* v. *State of New York*, 140 F. 2d 840 (C. C. A. 2, 1944).

Subsection 77 (b) in the 1933 Act included in "creditors" all holders of claims of whatever character against the debtor or its property. There is no significance, therefore, to lack of discussion in Congress of the wording of subsection 77 (b) as it was passed in 1935 as urged by the City (Brief, pp. 8-13).

Prior to 1938 subsection 57 (n) contained no such broad and all-inclusive language as that incorporated in 1933 in

---

[1] In reorganizations under Chapter X of the Bankruptcy Act claims of creditors solely against property have been held to come within the meaning of "claims" and "creditors" as defined.

In re Sponsor Realty Corp., 48 F. Supp. 735 (S. D. N. Y. 1943);

In re R. A. Security Holdings, Inc., 46 F. Supp. 254 (E. D. N. Y. 1942), aff'd 134 F. 2d 164 (C. C. A. 2, 1943).

The same holding was made in a § 77 B proceeding.

In re Westover, Inc., 82 F. 2d 177 (C. C. A. 2, 1936).

subsection 77 (b). In 1938, however, the revisions included a drastic amendment to subsection 57 (n), providing that all claims "including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided * * *." This revision subjected governmental claims to the same requirements as other claims, a purpose accomplished five years earlier as to railroad reorganization by the broad language of § 77. See Wurzel, *Taxation During Bankruptcy Liquidation* (1942), 55 Harv. L. Rev. 1141, 1146.

In *United States National Bank* v. *Chase National Bank*, 331 U. S. 28, judgment creditors filed secured claims in bankruptcy proceedings reciting as security liens on real property. It was held, under subsection 57 (h), that they could avail themselves of their security and share in the general assets as to the unsecured balance.

The opinion says (pp. 33-34):

> "Under these provisions [referring to § 57 (h) and 65 (a)] there are several avenues of action open to a secured creditor of a bankrupt. See 3 Collier on Bankruptcy (14th ed.) pp. 149-157, 255-259. (1) He may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession. *In re Cherokee Public Service Co.*, 94 F. 2d 536; *Ward* v. *First Nat. Bank*, 202 F. 609. (2) He must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734. (3) He may surrender or waive his security and prove his entire claim as an unsecured one. *In re Medina Quarry Co.*, 179 F. 929; *Morrison* v. *Rieman*, 249 F. 97. (4) He may avail himself of his

security and share in the general assets as to the unsecured balance. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131; *Ex parte City Bank*, 3 How. 292, 315."

The courts below took the view that *United States National Bank* v. *Chase National Bank, supra*, held that a lien creditor could rely solely on his lien only if the security was in his possession (R. 89).

See Collier, *Bankruptcy*, 14th ed., Vol. 3, § 57.07, p. 157, and text added in supplement.

The City's brief lays great stress on two cases (Brief, pp. 13-15, 23). In *Clem* v. *Johnson*, 185 F. 2d 1011 (8th Cir., 1950), cert. den. 341 U. S. 909, Clem was adjudicated a bankrupt in February, 1949, and in May, 1949, Johnson demanded an airplane on which he had a mortgage, but did not file a claim under subsection 57 (n). In February, 1950, however, Johnson filed a reclamation petition. The court held that the failure of Johnson to file a claim within six months in accordance with subsection 57 (n), did not result in loss of security and the petition for reclamation was sufficient. The trial court pointed out (94 F. Supp. 225) that a secured creditor need not comply with § 57 and file a claim but because of the possession of the bankruptcy court and its full jurisdiction the secured creditor must file an intervening petition to determine the validity of the lien and to supervise its enforcement.

The second case stressed by the City is *DeLaney* v. *City and County of Denver*, 185 F. 2d 246 (10th Cir., 1950). The City of Denver had tax liens upon assets of the bankrupt. It did not file a claim for taxes within six months but at a later date filed an intervening petition in which it disclaimed any claim against general assets but prayed that its tax liens be satisfied. It was held

that the filing of a formal claim under § 57 was not essential to the preservation of a lien.

> "However, after the jurisdiction of the bankruptcy court has attached to the security, the lien claimant may assert his lien to such security, or to the proceeds derived from the sale thereof, only in the bankruptcy court" (p. 251).

These two decisions make clear that a lien claimant must assert his claim to the security in the bankruptcy court. See *Bolling* v. *Bowen*, 118 F. 2d 59 (C. C. A. 4, 1941) (to assert lien on property in possession of bankruptcy court lienor must file petition and make necessary proof).

With reference to § 64 the City argues (p. 23) that this put upon the trustees the affirmative duty of searching out and paying all taxes legally due and owing. Prior to the amendment of June 22, 1938, § 64 provided for order by the court to the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality. In 1938 this provision was eliminated from subsection 64 (a) and now calls for hearing and determination as to the amount or legality of any taxes. At the same time subsection 57 (n) was amended to require that all claims due the United States or any State or subdivision thereof should be filed and proved like other claims against bankrupt estates.

> "When 1926 amendments of § 64 eliminated the arbitrary directive for payment of taxes and placed taxes in a priority status behind the expenses of administration and wage claims, any burden that might previously have been considered to exist on the trustee to run down and pay such obligations ceased to be part of the law." Remington, *Bankruptcy*, Vol. 6 (5th ed.), § 2829, pp. 422-423.

"The duty to search out taxes no longer exists as to pre-bankruptcy tax claims since these must now be proved like any other claim, but as to current taxes the trustee is himself the taxpayer or the taxpayer's representative." Wurzel, *Taxation During Bankruptcy Liquidation* (1942), 55 Harv. L. Rev. 1141, 1175.

Statutes providing for payment of taxes do not dispense with the necessity for the taxing authority to file a claim. Payment of taxes legally due and owing follows the claim and proof of amount and legality. Section 64 at no period dispensed with the necessity for making timely demand for payment of liens. The same result was reached in a receivership case. *McColgan* v. *Maier Brewing Co.*, 134 F. 2 . 385 (C. C. A. 9, 1943), cert. den. 320 U. S. 737. The same result would be reached under Order No. 1 (R. 42).

This Court has reserved decision on whether subsection 64 (a) is applicable in reorganizations under § 77. *Gardner* v. *New Jersey*, 329 U. S. 565, 578, n. 7; *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132. See Finletter, *The Law of Bankruptcy Reorganization* (1939 ed.), pp. 343-344; and Collier, *Bankruptcy*, Vol. 5 (14th ed.), par. 77.21, p. 539.

Furthermore, as shown above, in 1938 the provision for payment of taxes was eliminated and the New Haven's reorganization continued until September 18, 1947 during which time the City did nothing in spite of its knowledge of the proceedings.

It has been suggested that § 64 refers to taxes and not assessments, and to taxes unsecured by any lien. See *In re Dublin Veneer Co.*, 1 F. Supp. 313, 316 (S. D. Ga., 1932); and City's brief, p. 8.

The City alleges that under subsection (b) (evidently referring to (d)) of § 67, prior to 1938, and under present subsection (b), statutory tax liens on real property have been protected and that the filing of a notice of claim is not necessary (City's brief, pp. 9, 12-14).

It is quite obvious that subsection 67 (d) (prior to 1938) did not refer to statutory tax liens because they are not the "Liens given or accepted in good faith" there described. Present subsection 67 (b) provides that "statutory liens for taxes and debts owing to the United States or any State or subdivision thereof * * * may be valid against the trustee * * *." Present subsection 57 (n) provides that "all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided * * *." Subsection 67 (b) effected little change in the bankruptcy law, and read with subsection 57 (n) does not warrant the City's conclusion that it was not required to file a notice of claim.

Section 6 b of the Chandler Act of 1938 makes its provisions applicable to pending cases "so far as practicable."

> "It behooves creditors (in § 77 proceedings) to be vigilant in ascertaining the court's order fixing the time (to file claims), and to make sure that their claims are filed in time, for otherwise they may be unable to participate in the plan." Remington, *Bankruptcy* (1947 Replacement), Vol. 10, § 4192, p. 316.

POINT III.

With at least constructive notice of the bar order and actual knowledge of the bankruptcy proceedings the petitioner failed to file a notice of claim to preserve its statutory liens, as required, with the consequence that the property covered by the liens was properly declared by the Final Decree to be free and clear of the liens.

The sole issue in the United States Court of Appeals was whether the City was required to file a notice of claim with the trustees in reorganization in order to preserve its statutory liens for local assessments against specific parcels of real property (City's brief, Court of Appeals, p. 1). Under this issue it made two points: (1) since the reorganization court at no time affirmatively and upon specific notice to the City exercised jurisdiction over the liens, the Debtor took back the property subject to the liens; and (2) the proceedings, the Plan and Final Decree were not intended to and did not materially or adversely affect the liens.

In its petition for certiorari the City says (p. 7) two questions are presented: (1) whether the City is a creditor within the meaning of subsection 77 (c) (7); and (2) whether notice by publication to file claims is a reasonable notice under subsection 77 (c) (8). The second question was not presented until the petition for certiorari was filed. By reason of the position of the City up to that time it had been eliminated.

It is only in exceptional cases that this Court will consider questions not pressed or passed upon by the courts below. See *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434. This Court has followed a

policy of strict necessity in disposing of constitutional questions and, even where a constitutional question is properly presented by the record, the Court will not pass upon it if there is some other ground upon which the case may be disposed of. See Mr. Justice Brandeis concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347; *Alma Motor Co.* v. *Timken Co.*, 329 U. S. 129, 136, 137; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568.

Subsection 77 (c) (8) reads in part:

> "The judge shall cause reasonable notice of the period in which claims may be filed * * * by publication or otherwise."

Order No. 32 (R. 39-41), issued pursuant to subsection 77 (c) (7), and dated January 4, 1936, provided for the filing of claims by May 1, 1936, covered details with respect to the contents of claims and liens and their filing, and directed the Debtor to give notice to its creditors by promptly causing publication of a notice, containing all the foregoing, to be made once during each week for two consecutive weeks in five newspapers, including the Wall Street Journal, and by mailing copies of the order to its mortgage trustees and to such others as had entered their appearances.

The petition in this proceeding alleges (R. 3, par. 8) that the City of New York had timely notice of the reorganization proceedings and that the City has intentionally refused to file or evidence a claim for any of the assessments.

In its answer the City alleges that it has refused to cancel, discharge or remove any of the assessments and the liens thereof without receiving payment in full and that it has at all times insisted on enforcement of its assessment liens (R. 21-22, par. Fourth).

The affidavit of Meyer Scheps, Associate Assistant Corporation Counsel of the City of New York, shows that the City and the Trustees or their counsel dealt with the liens during reorganization (R. 38-39, par. 45).

The affidavit refers to Order No. 32, states that it provided for mailed notice to mortgage trustees and notice by publication for other creditors. The affidavit makes no complaint of the method of notice, that it was published rather than mailed, but argues that it was not intended for the City (R. 28, par. 17). The affidavit says: "The City relied upon the Trustees' course of conduct" (R. 33, par. 34). The City did not rely upon a failure to receive a mailed notice. It is clear throughout that the City knew it was dealing with trustees of a railroad in reorganization (R. 38-39, par. 45).

The affidavit of George H. Webster, Tax Agent of the Railroad, recites (R. 20, par. 11) that the City of New York had actual notice of the reorganization by June of 1936 or earlier.

Even though personal service is not impossible or impractical, service by publication may be quite reasonable. See *Security Bank* v. *California*, 263 U. S. 282, 288, which involved statutory escheat of bank deposits. If the party affected has the required information, the object of the notice is satisfied.

The City never filed any claims or petition to enforce a lien. The property was in possession of the trustees. The City has stood outside the bankruptcy proceedings.

In his Memorandum of Decision Judge Hincks said (R. 91-92):

> "No contention is made that the procedure of Sec. 77 was not faithfully followed in these proceedings, or even, if that be important, that the City lacked knowledge of the pendency of these proceedings under

> Sec. 77. Thus the City was chargeable with knowledge throughout that if the claims were not filed it might not participate."

The filing of the petition was a *caveat* to all the world. See *Mueller* v. *Nugent*, 184 U. S. 1, 14.

Subsection 77 (c) (8) calls for "reasonable notice * * * by publication or otherwise." If the creditor has knowledge of the proceedings in time to give it opportunity to avail itself of the rights and privileges accorded to other creditors its claim is barred. See subsection 17 (a) (3) and *Birkett* v. *Columbia Bank*, 195 U. S. 345, 350.

In *St. Louis & San Francisco R. R. Co.* v. *Spiller*, 274 U. S. 304, the plaintiff had obtained a judgment in 1916 for overcharges against the old company, and in 1916 the old railroad was sold to the new on foreclosure. The bar order was published. Spiller had no actual notice, failed to file a claim. The opinion says (p. 313):

> "There is no evidence in the record which supports the assertion that Spiller was not afforded an opportunity of participating in the reorganization. The contrary appears. The order confirming the foreclosure recites that 'a fair and timely offer of cash * * * or participation' was made to those unsecured creditors who had filed claims. Spiller did not file his claim. The fact that he did not have actual knowledge of the order limiting the time for filing claims is not material in this connection. Notice by publication was legally sufficient."

In *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, relied on by the City (Brief, pp. 29-30), the controversy questioned the constitutional sufficiency of notice to beneficiaries in judicial settlement of accounts by the trustees of a common trust fund established under the New York Banking Law. The Trust Company petitioned the Surro-

gate's Court for settlement of its first account as common trustee. Notice was given the beneficiaries by publication under Banking Law, § 100 (c) (12). It was held that the New York statute was unconstitutional as applied to known beneficiaries of known places of residence. The purpose of the notice is to apprise interested parties (pp. 314-315). This Court does not commit itself to any formula (p. 314). In the case at bar the City of New York knew of the reorganization proceedings and the publication served as "an additional measure of notification" (p. 318).

In *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, notice by publication as prescribed by the New Jersey Escheat Act, with reference to unclaimed stock and dividends of Standard Oil of New Jersey, was upheld as constituting due process.

We refer to the following cases on the question of notice:

Chicago Joint Stock Land Bank v. *Minnesota L. & T. Co.*, 57 F. 2d 70 (C. C. A. 8, 1932). Court entered bar order in receivership proceeding. Creditor acquired notice of the proceeding. "It had knowledge of the receivership and was charged with notice that the receivers could act only pursuant to order of court. It also was placed upon inquiry as to all proceedings taken in the receivership matter, including the order limiting the time for filing claims" (p. 73).

Duryee v. *Erie R. Co.*, 76 F. Supp. 635 (N. D. Ohio, 1948), aff'd 175 F. 2d 58 (6th Cir., 1949), cert. den. 338 U. S. 861. This was a § 77 proceeding. All parties were notified of all hearings with reference to the Plan, and notices of the hearings and action were published in newspapers. After confirmation of the Plan a final order under subsection 77 (f) was entered. The opinion says (p. 637):

> "Creditors would not participate in reorganizations if they could not feel that the Plan is final. Courts

have generally held that all creditors who had knowledge of bankruptcy proceedings are bound by the discharge of the debtor, even if they were not given specific notice and even though their claims were not filed, and Section 17 of the Bankruptcy Act, 11 U. S. C. A., § 35, so provides."

In re Corona Radio & Television Corporation, 102 F. 2d 959 (C. C. A. 7, 1939). Petition was filed in 77 B proceedings for allowance of claim after final decree. Petitioners urged that they had no notice of the entry of the final decree.

"It is admitted they had knowledge of the reorganization proceedings while doing business with the debtor, and could, no doubt, have protected themselves adequately during that time" (p. 963).

Mohonk Realty Corporation v. *Wise Shoe Stores*, 111 F. 2d 287 (C. C. A. 2, 1940), cert. den. 311 U. S. 654. Appellant was a party to the reorganization proceeding and received notice of the confirmation hearing. But the order winding up the estate was issued *ex parte*, without particular notice to appellant.

"The failure to give notice did not make the order invalid for lack of jurisdiction. A reorganization plan consummated under Chapter X is binding even as against creditors who were never scheduled and who never knew of the proceeding" (p. 290).

Piedmont Ice & Coal Co. v. *American Service Co.*, 130 F. 2d 78 (C. C. A. 4, 1942). Piedmont sold plant to Community Utilities which sold to Community Ice. Piedmont sued Community Ice in 1929 on contract claim and secured judgment in 1937. American Service Co. took over Community Ice in 1929 shortly after suit. In 1934 American Service Co. filed a petition for reorganization. Notice was given by publication only. It was held that

Piedmont should have known of the pendency of the reorganization proceeding. Suit was barred by the final decree.

McColgan v. *Maier Brewing Co.*, 134 F. 2d 385 (C. C. A. 9, 1943), cert. den. 320 U. S. 737. The tax officials had knowledge that the property of the corporation was in receivership. Even though the franchise taxes were made liens, and the receivers were subject to the state taxes, it was held that 28 U. S. C., § 124 (a) did not dispense with the necessity for making timely demand for payment.

Knapp v. *Detroit Leland Hotel Co.*, 153 F. 2d 715 (C. C. A. 6, 1946). The opinion says (p. 717):

> "Assuming that appellant took defaulted bonds, he was bound to know of the reorganization proceedings. He was bound to take notice of Section 77B, together with the specific provision that upon confirmation of a plan, the plan and its provisions are binding not only upon the debtor, but 'upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proof of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable. * * *' Title 11, U. S. C. § 207, sub. g, 11 U. S. C. A. § 207, sub. g."

Duebler v. *Sherneth Corporation*, 160 F. 2d 472 (C. C. A. 2, 1947). This case involved the issue of the power of a bankruptcy court to reopen a reorganization decree sometime after the final period to permit of the exchange of securities in accordance with the reorganization plan. It was held that notice by publication only of the order of confirmation and the final order was adequate, even though the particular bondholders had no actual notice or knowledge of the reorganization proceedings.

Willis v. *Consolidated Textile Co.*, 178 F. 2d 924 (2 Cir., 1950), cert. den. 339 U. S. 957; affirmed lower court on authority of the *Duebler* case.

There is a presumption in favor of actual notice, and the Record contains no rebuttal of the presumption by the City. See *In re Zimmerman*, 66 F. 2d 397, 399 (C. C. A. 2, 1933).

Finletter in *The Law of Bankruptcy Reorganization* says (pp. 673-674):

> "In ordinary bankruptcy a claim which is not listed in the bankrupt's schedules will not be barred unless the creditor had notice or actual knowledge of the proceedings. Under Chapters XI and XII this rule of ordinary bankruptcy obtains but under Chapter X and Section 77 the plan when confirmed is binding on all creditors, whether or not their claims have been filed; and the final decree under Chapter X discharges the debtor from its debts and liabilities except as provided in the plan or an order of the court. The ordinary bankruptcy rule is thus changed in proceedings under Chapter X and Section 77 and even if notice of the proceedings has been intentionally kept from a creditor the debt will be discharged. The court however has discretion, not to maintain the debt as such in force, but to allow a creditor to participate in the plan for cause shown even after the time for filing of claims has passed. This discretion must expire, however, when the plan is put into effect, for to allow a creditor to come into the plan after it is consummated would be to permit a collateral attack on the order of confirmation. The plan is necessarily based on the existence of a maximum amount of creditors and, as the rights of third parties will usually have intervened with the consummation, the increase of the number of participants in the plan is as much a collateral attack as if the creditors were allowed to prove the claim against the new company."

In the Court of Appeals the City did not complain of lack of knowledge or notice by publication. It contended that the filing of a notice of claim could have related only to the distribution of the general assets in which the City had no right to participate, and so the filing of a notice would have been a futile act (City's brief, p. 20); that the bankruptcy court had jurisdiction over tax liens only if the taxing authority appeared voluntarily in the proceedings or if the trustees applied to the court, on notice to the City, for adjudication of the legality or amount of the assessments (pp. 16, 19). The City's position was that it was not to file a claim under any circumstances. With or without notice, it did not intend to appear voluntarily or file a claim. The question of notice by publication or notice by mail becomes wholly immaterial because of this attitude.

The City argued that the word "claims" in subsection 77 (b) does not include statutory tax liens (pp. 8-14); that subsection 77 (c) (7) applies to tax claims but not to tax liens (p. 15); that the filing of a notice of claim would have been a futile act (p. 20); that the City was under no obligation to file a notice of claim or to take any affirmative action in preservation of its liens (p. 22); that the trustees were required to pay the liens or to petition the reorganization court for an adjudication as to their legality (p. 25). There was no complaint of inadequacy of notice by publication under subsection 77 (c) (8), but complaint that no specific notice had been given that the legality or the amount of the assessment would be questioned (pp. 15-16). It was the contention that failure to comply with the requirements of a general notice to creditors to file claims does not cut off statutory liens (p. 16).

This argument is not sound. To file a claim is not a mere formality or necessarily to adjudicate the legality or amount of the liens. Claims are filed for the purposes

of the plan. Subsection 77 (c) (7). The City cannot sit idle. It should file its claims or "set up a claim of lien upon security in the possession of the trustee by an intervening petition filed in the bankruptcy proceeding." *DeLaney* v. *City and County of Denver, supra,* 185 F. 2d 246, 251-252 (10th Cir., 1950). In other words, the City deliberately filed no claim, erroneously to be sure, and consequently suffered no damage by reason of the fact that the notice to file was published and not mailed.

The Railroad had always believed the City's assessments to be invalid as a matter of law and void *ab initio* (R. 2, 18). The City admits (Brief, p. 20) that assessments on right of way are invalid, but says (Brief, footnote p. 21) it must be assumed that these assessments were not on right of way. There is no basis for such an assumption, and it is not true in fact. During all the years from 1894 that the assessments existed, the City made no attempt to enforce them. It could not reasonably be expected that the debtor or its trustees would mail notice of Order No. 32 to the holders of such stale and invalid claims. The City knew of the Railroad's reorganization, and the burden under Section 77 rested upon it to come forward and file a claim if it still had any interest in enforcing its assessments and any belief that they were valid.

The record contains no reference to a judge's order to file a list of known creditors pursuant to subsection 77 (c) (4). There is no connection between the preparation of such a list and the duty to file claims. Furthermore, any failure of this nature cannot be attacked collaterally. *Mohonk Realty Corporation* v. *Wise Shoe Stores, supra,* 111 F. (2d) 287 (C. C. A. 2, 1940).

POINT IV.

The proceedings had in reorganization, the Plan of Reorganization, and the Consummation Order and Final Decree were intended to and did bar the liens.

With reference to construction Judge Hincks said (R. 88-89):

> "In short, on the point of construction none of the City's arguments have sufficient substance to alter my conclusion that it was the intent of the plan that the reorganized company should take free and clear of all claims not filed in the reorganization proceeding including those of the City now under consideration."

The trial judge had charge of the reorganization proceeding for 12 years, and this conclusion was within his discretion. See Section R of Plan (R. 75-76) and *Kelby* v. *Prudence-Bonds Corporation*, 140 F. 2d 185, 186 (C. C. A. 2, 1944).

Order No. 822, the decree confirming the Plan of Reorganization, dated September 6, 1945, contains this language (R. 60):

> "That the provisions of said plan of reorganization and of this order, subject to the right of judicial review, shall henceforth be binding upon the several debtors herein, all stockholders thereof, including those who have not, as well as those who have, accepted said plan, and all creditors secured or unsecured, whether or not adversely affected by said plan, and whether or not their claims have been filed, and, if filed, whether or not approved herein, including creditors who have not, as well as those who have, accepted said plan."

It also decrees (R. 60) that the property "shall be free and clear of all claims of the several debtors herein, their stockholders and creditors, and free and clear of all liens and other encumbrances, except as provided in said plan and in this order * * *."

Order No. 1007, the Consummation Order and Final Decree, dated September 11, 1947, reads in part (R. 66):

> "3. *Transfer and Discharge.* Upon the consummation date:
>
> "(i) all the business and affairs and the entire property and estate of the Debtor and the Secondary Debtors of every name and nature and all right, title and interest of * * * Trustees of the property of Debtor and the Secondary Debtors * * * shall vest in and become the absolute property of the Reorganized Company, free and clear of all claims, rights, demands, interest, liens, encumbrances of creditors or other obligees of the Debtor, or of the Secondary Debtors, or their properties, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company and of all rights and claims of the holders of shares of the capital stock of the Debtor and the Secondary Debtors; * * *."

Order No. 1007 provides for assumption of certain obligations, some of them liens (R. 67-68).

The deed of September 18, 1947, from the trustees to the reorganized company provided that the conveyance was "subject also, in so far as the property by this Indenture remised, released, transferred, assigned, conveyed, quit-claimed and set over may be subject to the liens of taxes and assessments lawfully levied or assessed against the same, to any and all such liens" (R. 30). The property continued subject to liens of assessments lawfully assessed against the property, that is, liens reserved by

the Plan and the Consummation Order. This appears from the clause in the deed reading (R. 18-19): "* * * free and clear of all claims, rights, demands, interests, liens, encumbrances of creditors or other obligees * * * of the Trustees or their predecessors * * * except the obligations imposed * * * by the Consummation Order or assumed * * * pursuant to the Consummation Order * * *."

Section L of the Plan of Reorganization provides (R. 71) that claims, to the extent unpaid at the date of confirmation of the Plan, shall be paid in cash or assumed by the Reorganized Company. Judge Hincks construed (R. 87-88) the word "claims" in Section L to have the same meaning as the word in § 77, that is, filed claims, and by reason of subsection 77 (c) (7), the City's claim, not having been filed, is not entitled to participate or entitled to priority. To hold otherwise is to contradict the plain language of Section L of the Plan.

In subdivision N (4) of the Plan (R. 73) the Reorganized Company was directed to pay any and all taxes due the United States, the Commonwealth of Massachusetts and any city, town or other political subdivision thereof from the Old Colony Railroad "without requiring proof thereof in the reorganization proceeding and without prejudice by reason of not having been approved in such proceeding * * *." Similarly, by subdivision O (2) the New Haven was to pay taxes due from the Boston and Providence Railroad (R. 75). Referring to the tax liens of the City of Boston on property of the Old Colony, Judge Hincks said (R. 88) that the Boston liens had been properly submitted to the Court for an order of payment and those liens were expenses of administration. "That no such provision was stated for the City's [New York] liens imparts an intent that no similar exception of the City's liens was intended" (R. 88). Where waiver of filing of claims was allowed, it was done in specific language. The absence in § 77 of an express waiver of the

requirement of filing state and municipal tax and assessment claims, and the absence in the Plan of any such waiver as far as the City was concerned, indicate strongly that municipal claims must be filed unless expressly waived.

Order No. 736 of March 13, 1944 [(R. 50-54), see also R. 56)] divided certain creditors and stockholders into classes for the purpose of the Plan and its acceptance. The Order was concerned with creditors entitled to vote on the Plan (R. 50). If the City had filed a claim and it had been approved, the City would not have been adversely affected by the Plan and would not have been entitled to vote on the Plan. Subsection 77 (e). Even if the City would have been adversely affected by the Plan, it would not have appeared among the list of those entitled to vote on the Plan unless it had filed a claim (R. 87).

The City refers (City's brief, p. 39) to the first report of the Interstate Commerce Commission approving the original Plan of Reorganization and says there is no indication of intention to disturb pre-existing tax liens (R. 48-49). Only filed claims were covered by Section L of the Plan. For the first report not to mention the liens of the City, which were not presented to the Commission, is neither a negative nor an affirmative indication with respect to the liens and the omission is consistent with the position taken by the courts below.

The courts below concluded (R. 86, 88) that the Final Decree provided that the entire property should vest in the Reorganized Debtor free and clear of all claims and liens except for the claim referred to. Some twenty-seven obligations were to be assumed; but these did not include the City's liens.

The courts below concluded (R. 87) that Order No. 736, classifying creditors and stockholders for the purpose of the Plan did not include the City because of the absence of any approved claims.

The courts below concluded (R. 87-88) that the City was not within the contemplation of Section L of the Plan because the City's claim was never filed and was not, therefore, entitled to priority under Section L.

The courts below also concluded (R. 88) that the deed did not impose the City's liens on the reorganized corporation because of the wording of the Final Decree. The deed, of course, could not lawfully violate the provisions of the Plan.

The purpose of reorganization is to review all claims. It would defeat this purpose if secured creditors could stand aside. The Final Decree established new rights to the property. Any modification of the Decree would prejudice these new rights. Subsection 77 (f) makes the Plan and Order of Confirmation binding upon "all creditors secured or unsecured, whether or not adversely affected by the Plan, and whether or not their claims shall have been filed * * *". It also directs that "property dealt with by the plan, when transferred and conveyed to the debtor * * * shall be free and clear of all claims of * * * creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance * * *."

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent.

ROBERT M. PEET,
JAMES D. O'NEILL,
Of Counsel.

APPENDIX.

Pertinent Sections of National Bankruptcy Acts.

Subsection 17 (a) (3), Act of July 1, 1898, c. 541, § 17, 30 Stat. 550, as amended by Act of June 22, 1938, c. 575, § 1, 52 Stat. 851, 11 U. S. C., § 35 (a) (3), reads in part as follows:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; * * *."

Subsection 57 (n), Act of July 1, 1898, c. 541, § 57, 30 Stat. 560, as amended by Act of May 27, 1926, c. 406, § 13, 44 Stat. 666, 11 U. S. C., § 93 (n), prior to 1938 read in part as follows:

> "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment; * * *."

Subsection 57 (n), Act of July 1, 1898, c. 541, § 57, 30 Stat. 560, as amended by Act of May 27, 1926, c. 406, § 13, 44 Stat. 666, as amended by Act of June 22, 1938, c. 575, § 1, 52 Stat. 866, 11 U. S. C., § 93 (n), was amended in 1938 to read in part as follows:

> "Except as otherwise provided in this title, all claims provable under this title, including all claims

of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however*, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: * * * When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case."

Subsection 64 (a), Act of July 1, 1898, c. 541, § 64, 30 Stat. 563, as amended by Act of May 27, 1926, c. 406, § 15, 44 Stat. 666, 11 U. S. C., § 104 (a), prior to 1938 read as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

Subsection 64 (a), Act of July 1, 1898, c. 541, § 64, 30 Stat. 563, as amended by Act of May 27, 1926, c. 406, § 15, 44 Stat. 666, as amended by Act of June 22, 1938, c. 575,

§ 1, 52 Stat. 874, 11 U. S. C., § 104 (a), was amended in 1938 to read in part as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court * * *."

Subsection 67 (d), Act of July 1, 1898, c. 541, § 67, 30 Stat. 564, as amended by Act of June 25, 1910, c. 412, § 12, 36 Stat. 842, 11 U. S. C., § 107 (d), prior to 1938 read as follows:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein."

Subsection 67 (b), Act of July 1, 1898, c. 541, § 67, 30 Stat. 564, as amended by Act of June 22, 1938, c. 575, § 1, 52 Stat. 875, 11 U. S. C., § 107 (b), was amended in 1938 to read as follows:

> "The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and

debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

Subsection 77 (a), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (a), reads in part as follows:

"If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Subsection 77 (b), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, 11 U. S. C., § 205 (b), prior to 1935 read in part as follows:

"The term 'creditor' shall, except as otherwise specifically provided in this section, include, for all

purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this title."

Subsection 77 (b), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (b), was amended in 1935 to read in part as follows:

"The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Subsection 77 (c) (4), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (c) (4), reads in part as follows:

"The judge * * * shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, * * *"

Subsection 77 (c) (7), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774,

49 Stat. 911, 11 U. S. C., § 205 (c) (7), reads in part as follows:

> "The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests."

Subsection 77 (c) (8), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (c) (8), reads as follows:

> "The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

Subsection 77 (f), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (f), reads in part as follows:

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

Subsection 77 (j), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (j), reads in part as follows:

> "In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: * * *"

Subsection 77 (l), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (l), reads as follows:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Subsection 77 (o), Act of Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, as amended by Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C., § 205 (o), reads in part as follows:

> "The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. * * *"